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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

YALE TIFFANY KOZINSKI,
Petitioner

v.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

PETITION FOR WRIT OF CERTIORARI

MARCY J.K. TIFFANY
Counsel of Record
33 Marguerite Drive
Rancho Palos Verdes, CA 90275
(310) 541-9294

Attorney for Petitioner

68 pp

QUESTION PRESENTED

Whether petitioner was denied due process during his criminal trial because no prosecutor was present and the state trial judge, who was also the finder of fact, was required to perform the prosecutor's functions?

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Division of the Superior Court, State of California, County of Los Angeles, issued May 2, 2001.

OPINIONS BELOW

The unreported Memorandum of Judgment of the Appellate Division of the Los Angeles Superior Court, dated May 2, 2001, is reproduced at App. 1-4. The unreported Order Denying Rehearing of the Appellate Division of the Los Angeles Superior Court, dated May 31, 2001, is reproduced at App. 5-6. A letter from Alan Hardey, Appellate Administrator, to petitioner Yale Kozinski, dated June 27, 2001, advising him that his Notice of Appeal from the Appellate Division's judgment was being returned unfiled because "there is no provision of law for an appeal, as such, from a decision of an Appellate Division of the Superior Court," is reproduced at App. 7. The Judgment of Conviction of the Los Angeles Superior Court, dated October 31, 2000, is reproduced at App. 8-9.

STATEMENT OF JURISDICTION

Petitioner was convicted of a criminal offense in the Los Angeles Superior Court. He appealed to the Appellate Division of the Superior Court, which affirmed on May 2, 2001. Petitioner's timely petition for rehearing was denied on May 31, 2001. California law does not provide for further appeal from a decision of the

Appellate Division of a Superior Court. Cal. Const. Art. VI, §§ 11, 12; Cal. Penal Code §§ 1466, 1471 (West 2000); *Whittaker v. Superior Court*, 438 P.2d 358, 365 (1968). Because this petition is filed within 90 days of the denial of the petition for rehearing by the Superior Court Appellate Division, this Court has jurisdiction. 28 U.S.C. § 1257(a) (2000); Robert L. Stern, et al., Supreme Court Practice § 3.11, at 112-13 (7th ed. 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Vehicle Code, Section 21955:

Between adjacent intersections controlled by traffic control signal devices or by police officers, pedestrians shall not cross the roadway at any place except in a crosswalk.

California Vehicle Code, Section 40000.1:

Except as otherwise provided in this article, it is unlawful and constitutes an infraction for any person to violate, or fail to comply with any provision of this code, or any local ordinance adopted pursuant to this code.

California Penal Code, Section 16:

Crimes and public offenses include:

1. Felonies;

2. Misdemeanors; and

3. Infractions.

STATEMENT OF THE CASE

Petitioner was cited for jaywalking in violation of California Vehicle Code Section 21955. In California, this is classified as a criminal offense, to wit an infraction. Cal. Veh. Code § 40000.1 (West 2000); Cal. Penal Code § 16(3) (West 1999). Believing that the citation was erroneously issued, defendant appeared in the Los Angeles Superior Court and pleaded not guilty. The case was set for trial on October 31, 2000.

Petitioner appeared in court on the day of trial, as did the officer who had issued the citation. However, no prosecutor appeared to represent the state. When the case was called, petitioner objected to the absence of a prosecutor and moved for dismissal of the charges. In support of the motion, petitioner argued that the state had not made an appearance in the case because, as an

incorporeal entity, it could appear in court only through counsel. Petitioner also objected to the absence of a prosecutor on the ground that it would force the trial judge to perform the function of the prosecutor, such as presenting the state's witness, questioning the witness, cross-examining defendant and raising objections to defendant's evidence. The court denied the motion and, after a short trial, found defendant guilty and ordered him to pay a fine and penalty assessment totaling $77.

Petitioner timely appealed pro se to the Superior Court Appellate Division, raising several state law issues, as well as his argument that the absence of a prosecutor denied him due process, in violation of the United States Constitution. Because of delays in the preparation of the trial transcript and petitioner's unfamiliarity with the somewhat arcane procedures for certifying a trial record to the Superior Court Appellate Division, petitioner failed to file a timely transcript. *See* n. 8 *infra*. The Appellate Division consequently did not consider petitioner's state law claims, nor the portion of his due process argument that was based on the trial judge's actual conduct at trial. Those claims are therefore not raised in this petition.

The Appellate Division, however, did address and reject on the merits petitioner's claim that he was denied due process because no prosecutor was present at trial. Finding that the absence of a prosecutor could be determined by reviewing the clerk's transcript (what in federal court would be called the clerk's record), the Appellate Division reached the merits of petitioner's due process claim and ruled that petitioner's argument "is contrary to settled California law." App. 2. The Appellate Division continued:

> The California Supreme Court has held that a traffic trial may be conducted by a judge without the presence of a prosecuting attorney. "From the foregoing we conclude that the trial court may call and question witnesses in the absence of a prosecutor. Such actions constitute neither a per se denial of due process nor transmute the judge into prosecutor."

App. 2 at (quoting *People v. Carlucci*, 590 P.2d 15, 20 (1979)).

Petitioner's efforts to obtain further state-court review were thwarted when his petition for rehearing was denied by the Appellate Division of the Superior Court and when his notice of appeal was rejected on the ground that California law provides no avenue of review from a decision of the Appellate Division of the Superior Court.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Divided the State and Federal Courts.

The Court should issue a writ of certiorari to resolve a conflict between the opinion of the California Supreme Court in *People v. Carlucci*, 590 P.2d 15 (1979)—which formed the only basis for the decision below—and the opinions of most lower federal courts to have ruled on the issue, significantly those of the First Circuit in *Figueroa Ruiz v. Delgado*, 359 F.2d 718 (1st Cir. 1966), and the Ninth Circuit in *F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, Inc.*, 244 F.3d 1128 (9th Cir. 2001). The issue

has also divided the state courts, with New Jersey following California and Colorado taking a contrary path.

The issue presented is as clear-cut as it is fundamental to the fair administration of justice: May a state pursue an entire class of criminal prosecutions with absolutely no involvement from any prosecutors? The Supreme Court of California in *Carlucci* held that it could. In the California Supreme Court's view, the functions normally performed by a prosecutor—such as calling and questioning prosecution witnesses—can be performed by the trial judge "without jeopardizing the court's ability to act in a judicious, independent, detached, and neutral manner." *Carlucci*, 590 P.2d at 21. In the *Carlucci* court's view, the absence of a prosecutor actually helps defendant because it saves him from having to face the "opposition [of] a professional adversary." *Id.* at 21.

The First Circuit in *Figueroa Ruiz* took exactly the opposite view when confronted with a Puerto Rico procedure identical to that employed in petitioner's case. Commenting on a practice of having the judge call prosecution witnesses, interrogate them and cross-examine defendant, the *Figueroa Ruiz* court observed as follows:

> Under the procedure in the Puerto Rico District Court the judge must alternate roles in rapid succession, or even assume both at once. Thus, when interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as a judge, and at the same time considering what question, as prosecutor, to ask next.

> Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men.

Figueroa Ruiz, 359 F.2d at 720.

Carlucci based much of its analysis on the undisputed right of trial judges to question, and even call, witnesses in adversary proceedings. In *Carlucci*'s view, calling and questioning *all* prosecution witnesses was merely an extension of this inherent power of a trial court. *Carlucci*, 590 P.2d at 19-20. *Figueroa Ruiz* flatly rejected this argument:

> Respondent's attempt to equate the District Court practice with the right of questioning afforded a federal trial judge falls far short of the mark. The federal judge replaces neither the prosecutor nor counsel for the defense, but, at most, supplements both. . . . The Commonwealth's judge's intervention is not ancillary. It is fundamental, and continuous throughout the trial. Even more important, he is primarily motivated to speak only on one side.

Figueroa Ruiz, 359 F.2d at 720.

Carlucci also took comfort from the fact that, if the trial judge's questioning of the witnesses or other conduct at

trial betrays actual bias, the error can be corrected on appeal. *Carlucci*, 590 P.2d at 21-22. *Figueroa Ruiz*, once again, adopted the diametrically opposite position:

> Unfortunately, the very nature of the unfairness complained of is such that it may not be visible on the face of the record, no matter how conscientiously the record is scrutinized by the appellate court. The judge's failure to fulfill his optimum judicial duty cannot be measured either by the form of the questioning, or by the adequacy of the evidence.

Figueroa Ruiz, 359 F.2d at 722.

The Ninth Circuit earlier this year reached the same conclusion in *F.J. Hanshaw*. This case involved the imposition of $700,000 in sanctions ($500,000 payable to the United States, $200,000 to the opposing party) for attempting to bribe a court-appointed trustee; imprisonment was not an issue. *F.J. Hanshaw Enters.*, 244 F.3d at 1131. Following *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821 (1994), the Ninth Circuit concluded that the sanctions were criminal in nature. *F.J. Hanshaw Enters.*, 244 F.3d at 1138. The Ninth Circuit then reversed the sanctions because the district court had not afforded the sanctioned party the procedures due in criminal cases, including the presentation of the case by an independent prosecutor. *Id.* at 1140.

Relying on *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), and *Berger v. United States*, 295 U.S. 78 (1935), the *Hanshaw* court held that the

participation of an impartial prosecutor is an indispensable part of a criminal proceeding. As the Ninth Circuit recognized, "a prosecutor plays an important role in the criminal process. Prosecutors, both government and specially appointed, have an ethical duty to ensure that 'justice be ... done' and, while responsible for prosecuting the guilty, they must also make sure that the innocent do not suffer." *F.J. Hanshaw Enters.*, 244 F.3d at 1140 (quoting *Berger*, 295 U.S. at 88).

The constitutional significance of maintaining a clear separation between the adjudicative and prosecutorial functions was recognized by this Court in *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). The Court there considered an INS deportation procedure that called for a hearing before an immigration inspector, whose duties "include investigation of like cases; and while he is today hearing cases investigated by a colleague, tomorrow his investigation of a case may be heard before the inspector whose case he passes on today." *Id.* at 45. At times, the Court noted, "an 'examining inspector' may be designated to conduct the prosecution," *id.* (quoting 8 C.F.R. § 150.6(n)), but "[t]he presiding inspector, where no examining inspector is present, is required to 'conduct the interrogation of the alien and the witnesses in behalf of the Government and shall cross-examine the alien's witnesses and present such evidence as is necessary to support the charges in the warrant of arrest,'" *id.* at 45-46 (quoting 8 § C.F.R. 150.6(b)). The Court found "beyond doubt" that, in passing the Administrative Procedure Act, Congress set up safeguards that "were intended to ameliorate the evils from the commingling of [prosecuting and adjudicating] functions as exemplified here." *Id.* at

46. Concluding that the APA did apply to these proceedings, the Court noted that to hold otherwise "might again bring [the Immigration Act] into constitutional jeopardy. When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Id.* at 50

Also significant is *In re Murchison*, 349 U.S. 133 (1954), which involved trial before a judge who, under state law, had the authority to act as a "one-man grand jury." In concluding that it was a violation of due process for a judge who charged a defendant to then sit as trier of fact of the same charges, the Court recognized that many judges could, nevertheless, be impartial under such circumstances. But, the Court noted, "our system of law has always endeavored to prevent even the probability of unfairness." *Id.* at 136.

Having assumed a prosecutorial role, the judge may develop an interest in the outcome, which could then affect his impartiality. Quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), the *Murchison* Court noted that "every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *In re Murchison*, 349 U.S. at 136.

At least one other state appears to have followed California in holding that a prosecutor need not be present during criminal proceedings. The defendant in *State v. Avena*, 657 A.2d 883 (N.J. Super. Ct. App. Div. 1985), was convicted of harassment by offensive touching,

a crime that carried a maximum sentence of 30 days' imprisonment; no prosecutor was present and the judge questioned the prosecution's witnesses. Relying on *Carlucci*, the New Jersey court held that the absence of a prosecutor did not violate due process because the trial court's questions did not display a bias in favor of the prosecution. *Avena*, 657 A.2d at 889.

By contrast, the Supreme Court of Colorado has reached the opposite conclusion. In *People v. Martinez*, 523 P.2d 120 (Colo. 1974), the court found that the absence of a prosecutor in a case involving charges of theft and burglary caused the trial judge to "assume[] the role of the district attorney." *Id.* at 120. Citing concerns about judicial impartiality, the court held that the trial court violated defendant's right to due process.

On the question presented by petitioner, it therefore appears that the courts of at least two states, California and New Jersey, have held that the absence of a prosecutor does not violate due process, while at least one other state, Colorado, and two federal circuits, the First and the Ninth, have held to the contrary.[1] The inferior

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[1] The First Circuit may have taken a small step back from *Figueroa Ruiz* in *In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989), when it held that "it was not reversible error in these particular circumstances" for the district court to proceed without a prosecutor where the factual controversy was simple and the judge had been present when the disputed facts occurred. *Id.* at 934. Two published opinions from the District of Maryland, *United States v. James*, 440 F. Supp. 1137 (D. Md. 1977), and *United States v. Glover*, 381 F. Supp. 1139 (D. Md. 1974), held that the absence of a prosecutor was not a violation of due process where the magistrate's questioning of the prosecution's witnesses betrayed no bias. By contrast, the District

federal courts cannot, of course, overrule state court decisions that they believe to be incorrect; nor can state courts change the law of the federal courts or that of other state courts. The only way to resolve the expanding conflict over this recurring issue is for this Court to grant the petition and set the matter for plenary consideration.

II. The Petition Presents a Question of Exceptional Importance That Has Not Been, but Should Be, Decided by This Court.

As this Court recognized only last Term in *Atwater v. City of Lago Vista*, 121 S. Ct. 1536 (2001), a state's decision to classify an offense as criminal can have monumental constitutional implications. By classifying a minor transgression, such as failure to wear a seat belt, as a crime, a state can empower its police to take a suspect to jail in handcuffs and keep him there until he is able to post bond. *Id.* at 1541-42. [2]

Court for Puerto Rico followed *Figueroa Ruiz* by setting aside a conviction obtained in a Commonwealth court without the presence of a prosecutor, *De Méndez v. Aponte*, 294 F. Supp. 311 (D.P.R. 1969), and the District of South Dakota followed *Figueroa Ruiz* in holding that a tribal court procedure where the judge conducted criminal trials in the absence of a separate prosecutor violated due process, *Wounded Knee v. Andera*, 416 F. Supp. 1236, 1240 (D.S.D. 1976) ("regardless of the integrity and skill of the tribal judge, a fair trial cannot be had when the judge also has the duty of prosecuting").

[2] As this Court noted in *Atwater*, California has substantially narrowed the authority of its police officers to arrest individuals

While the risk of immediate arrest is the most visible consequence of criminalizing prohibited conduct, there are many others, among them the following:

i. Willful failure to make a court appearance, or pay the fine (sometimes euphemistically called "bail"), within the time allotted is itself a crime and may result in the issuance of an arrest warrant. *See*, Cal. Veh. Code §§ 40508(a), 40515(a) (West 2000).

ii. Willful failure to pay a fine, or an installment of a fine, is a crime. *Id.* § 40508(b).

iii. Failure to pay a fine, even if not willful, may result in summary impoundment of one's driver's license and the imposition of an order not to drive, the violation of which is contempt of court. *Id.* § 40508(d).

Thus, while the offense of which petitioner was convicted could itself result only in the imposition of a fine, the system by which the State of California has

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suspected of petty offenses, such as traffic infractions. *Atwater*, 121 S. Ct. at 1556 (citing Cal. Veh. Code Ann. § 40504 (West 2000)). However, the officer may arrest a suspect if he refuses to sign the ticket or fails to provide a "satisfactory evidence of his identity." Cal. Veh. Code §§ 40302(a), 40504(a) (West 2000); Cal. Penal Code § 836(a) (West Supp. 2000). The officer has vast discretion in determining what constitutes an acceptable proof of identity, unless the suspect presents a driver's license or its functional equivalent. *See People v. Monroe*, 16 Cal. Rprt. 2d 267, 277-78 (Ct. App. 1993). A California driver who forgets his wallet at home can thus end up in jail if he is stopped for a seat-belt violation.

chosen to enforce its traffic offenses and other petty infractions is steeped in the coercive processes of the criminal law.

This, of course, is the State's choice to make. Other states, such as Florida and Washington, have chosen to decriminalize their traffic offenses, making routine traffic infractions punishable only by a civil fine. *See* Wash. Rev. Code Ann. §§ 46.63.020, 46.3.110(1) (West 2001); Fla. Stat. Ann. § 318.14(1) (West 2001); *Nettleton v. Doughtie*, 373 S.2d 667, 668 (Fla. 1979).[3] When the state chooses to enforce its traffic laws through civil or administrative processes, it is entitled to far greater latitude than when it proceeds criminally. *See Van Harken v. City of Chicago*, 103 F.3d 1346, 1349 (7th Cir. 1997) (the absence of a prosecutor is not a denial of due process where the state has "decriminalized parking violations and substituted a civil penalty system"); *State v. Johnson*, 345 S.2d 1069 (Fla. 1977) (the absence of a prosecutor is not a denial of due process where the state has decriminalized certain motor vehicle violations); *City of Bellevue v. Hellenthal*, No. 69881-3, 2001 WL 867917 (Wash. Aug. 2, 2001) (en banc) (the prosecutor

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[3] Even more states, California included, have decriminalized parking offenses. *See, e.g.*, Cal. Veh. Code §§ 4760.1, 40200(a) (West 2000); *Van Harken v. City of Chicago*, 103 F.3d 1346, 1349-50 (7th Cir. 1997); *Gardner v. City of Columbus*, 841 F.2d 1272, 1274 (6th Cir. 1988). Under a civil or administrative enforcement scheme, the state may not imprison someone who fails to appear in response to a citation, or for failure to pay the fine after an appearance. Rather, the fine can be collected by the state just like a judgment in a civil case, or it may serve as grounds for denying registration of the vehicle involved in the illegality. Cal. Veh. Code § 40220 (West 2000); *see also* Ohio Rev. Code Ann. §§ 4511.07, 4521.02(A) (West 2001).

need not be present at a civil trial for a traffic infraction).[4] California, however, wants the best of both worlds, providing those accused of traffic infractions with diminished procedural safeguards, while exposing them to the full machinery of criminal enforcement if they fail to comply.

When states have chosen to avail themselves of their criminal-law powers, this Court has been punctilious in enforcing the requirements of due process, no matter how petty the penalties. *See, e.g., Ward v. Village of Monroeville*, 409 U.S. 57 (1972) (two $50 traffic fines); *Mayer v. Chicago*, 404 U.S. 189 (1971) (two $250 fines for disorderly conduct and interference with police officer); *Tumey v. Ohio*, 273 U.S. 510 (1927) ($100 fine for unlawful possession of liquor). Indeed, as the Court unanimously noted in *Mayer*, the need for fairness and procedural regularity is perhaps at its zenith where petty criminal offenses are involved:

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[4] Even in the civil context, some judges are hesitant to approve procedural shortcuts. The dissenting justice in *Hellenthal* has eloquently voiced these misgivings:

> The appearance of justice is lost ... when the State's only representative at a contested traffic hearing is the judge .... Far from a matter to be disposed of lightly, the appearance of justice in a traffic court setting is particularly important. Citizens often stand alone against the arrayed representatives of the State's authority in contested traffic infractions. This setting frequently represents a citizen's only exposure to the judicial process. Under these circumstances, it is more, not less, important that the appearance of justice is preserved.

Hellenthal, 2001 WL at *6, 9.

> "[F]ew citizens ever have contact with the higher courts. In the main, it is the police and the lower court Bench and Bar that convey the essence of our democracy to the people.
>
> "Justice, if it can be measured, must be measured by the experience the average citizen has with the police and the lower courts."

Mayer, 404 U.S. at 197 (quoting Murphy, *The Role of the Police in Our Modern Society*, 26 Rec. Ass'n B. of N.Y. 292, 293 (1971)).

While, for the reasons explained above, this Court's opinions in *Wong Yang Sung* and *Murchison* give strong support to petitioner's claim that due process requires the participation of a prosecutor in any criminal proceeding, petitioner acknowledges that this Court has not spoken to this issue directly. The matter probably would not merit this Court's intervention if petitioner's case were merely an isolated instance where the prosecutor happened to be absent. *See, e.g., In re Grand Jury Proceedings*, 875 F.2d 927 (1st Cir. 1989).

But petitioner's is undoubtedly not an isolated case. It reflects, rather, a sea change in the way infractions are prosecuted in the state of California. While maintaining all of the coercive mechanisms of the criminal law, the state has removed the meliorative influence of a prosecutor from an entire category of offenses, namely traffic infractions. Taking their cue from the state supreme court's opinion in *Carlucci*, California prosecutors in county after county have stopped showing up for traffic infractions. *See People v. Stapf*, 34 Cal. Rptr.

2d 351, 355 n.10 (Ct. App. 1995); *People v. Marcroft*, 8 Cal. Rptr. 2d 544 (App. Dep't Super. Ct. 1992); *People ex rel. Kottmeier v. Municipal Court*, 269 Cal. Rptr. 542 (Ct. App. 1990); *People v. Daggett*, 253 Cal. Rptr. 195 (App. Dep't Super. Ct. 1988).

Kottmeier illustrates how this process evolved, without judicial supervision and, occasionally, over significant judicial opposition. Kottmeier was the District Attorney for San Bernardino County; he brought a mandamus petition against the judges of San Bernardino Municipal Court to compel them to hold trials in traffic infraction cases without the appearance of a Deputy District Attorney to represent the state.[5] The Municipal Court judges responded by arguing, inter alia, that the absence of a deputy district attorney "place[s] the court in the intolerable position of playing the role of prosecutor," *Kottmeier*, 269 Cal. Rptr. at 544, and that they "cannot . . . be forced to conduct trials without the assistance of an attorney for the People, and to assume the responsibility of ensuring that both sides fairly and completely present their cases." *Id.* at 546. Relying on *Carlucci*, the court of appeal in *Kottmeier* granted mandamus and ordered the reluctant judges to conduct trials without prosecutors. *Id.*

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[5] At that time, traffic infractions were tried in the Municipal Court of each County. Pursuant to recent constitutional amendment authorizing the consolidation of trial court functions, the Municipal Court has been eliminated in 55 of California's 58 counties, and its functions and judges have been transferred to the Superior Court. Cal. Const. Art. VI, § 5(e) (effective June 3, 1998). Petitioner's trial occurred after the Los Angeles County courts were consolidated and, therefore, was conducted in the Los Angeles Superior Court.

at 547. *Kottmeier* is not an isolated example of judicial discomfort with *Carlucci*. *See Stapf*, 34 Cal. Rptr.2d at 355 n.10 ("Much more disturbing to us is the practice of trying traffic cases in the total absence of a prosecutor, as apparently occurs with some frequency locally and in other parts of the state [,] . . . but the practice has been approved by the Supreme Court [in *Carlucci*]."); *Daggett*, 253 Cal. Rptr. at 198 (Marvin, J., dissenting) ("The unilateral decision of the district attorney to transfer prosecution to the court raises serious ethical questions for the traffic judge because even the appearance of impropriety in the conduct of trials is prohibited.").

Our criminal justice system is adversarial, not inquisitorial. Inquisitorial systems, where there is no clear demarcation between judge and prosecutor, maintain their own peculiar safeguards to ensure that justice prevails.[6] Our system depends on the clash of adversaries performing their assigned roles under the supervision of an impartial judge. All players in the courtroom drama—prosecutor, defender, witness, judge—have a role to play, a role that is different from, and often antithetical to, that of the others. In the case of

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[6] In France, for example, judges and prosecutors come from the same cadre of professionals and perform complementary functions. A particular member of the corps may one day serve as a judge and, at a later time, as a prosecutor. Even then, there is no clear separation between judicial and prosecutorial functions, as we understand that term. Rather, the prosecutor often performs functions we would consider judicial and vice versa. See Bron McKillop, *The Judiciary in France – Reconstructing Lost Independence, in* Fragile Bastion: Judicial Independence in the Nineties and Beyond 113 (Helen Cunningham ed., 2000).

a prosecutor, some of those functions involve calling and examination of witnesses, introduction of evidence, objecting to questions by the opposing side, cross-examining defense witnesses and responding to objections, arguing inferences to be drawn from the evidence presented, ensuring that there is proof supporting all elements of the alleged crime, citing relevant authority and arguing the correct application of the law. The prosecutor also has a variety of functions to perform prior to trial, such as exercising prosecutorial discretion as to whether to drop or reduce some of the charges.

Not all of these functions will be relevant in every case, but where tens or even hundreds of thousands of trials are conducted every year, each one of those functions surely comes into play in a significant number of cases.[7] Who exactly will perform those functions when they *do* become relevant to the proceedings? Almost certainly, the functions will devolve upon the only legally trained

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[7] It is difficult to tell precisely how many cases are involved. According to published statistics of the California courts for the 1998-99 fiscal year, 269,813 traffic infraction cases statewide were resolved after trial. Petitioner does not know how many of California's 58 counties dispense with a prosecutor in traffic infraction cases, although he believes that the practice is virtually universal. Considering only the three counties which were the subject of the available opinions in *Stapf* and *Marcroft* (Orange), *Kottmeier* (San Bernardino) and *Daggett* (Sacramento), in addition to Los Angeles County where petitioner's case comes from, that amounted to 122,693 trials that year. Admin. Office of the Court, Judicial Council of Cal., 2000 Court Statistics 53 tbl.10f (2000) [hereinafter 2000 Court Statistics].

person in the courtroom, namely the trial judge. Indeed, this is precisely what *Carlucci* seems to have anticipated. *Carlucci*, 590 P.2d at 21. While *Carlucci* expressed hope that judges could do so in a fair and impartial manner, there is much to commend the position of the First Circuit in *Figueroa Ruiz* that judges who must fill in for an absent prosecutor cannot always be counted on to perform their judicial function in a fair and impartial manner. *See* pp. 6-7 *supra*.

People v. Marcroft, 8 Cal. Rptr. 2d 544 (App. Dep't Super. Ct. 1992), offers a revealing glimpse into the hidden dangers of permitting trial judges to adopt the functions of a prosecutor. The case involved an arcane feature of California procedural law applicable only to appeals to the Superior Court Appellate Division. Rather than being permitted to file a transcript as the trial record, appellants in such cases must obtain a "settled statement" from the trial court. Cal. R. of Ct. 184. To do this, they must file a "proposed settled statement," and the trial judge must then hold a hearing to determine what actually happened at trial. Cal. R. of Ct. 187.[8] In *Marcroft*,

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[8] Petitioner is intimately familiar with these rules, having run afoul of them himself. Petitioner interpreted Cal. R. of Ct. 184 to permit *either* a settled statement *or* a trial transcript. Having timely ordered a transcript, he waited for several weeks while the court reporter overcame various difficulties in preparing such transcript. When the transcript finally became available, petitioner immediately attempted to file it with the Superior Court Appellate Division, only to have it rejected because he had failed to prepare a settled statement. The settled statement requirement seems particularly inapt in a case like this where a transcript is actually available; indeed, it seems unnecessarily confusing because (as *Marcroft* explains) it calls for the

the trial judge did not hold a hearing, but transmitted to the Appellate Division three documents, one of which was a memorandum from the citing police officer giving his recollection of what had happened at trial. The Appellate Division recognized that the trial judge must have contacted the police officer and obtained this memorandum, and held that this was an impermissible ex parte communication. Obtaining the statement of a witness is, after all, the function of an advocate, not the court. While an alert appellate panel in *Marcroft* recognized the issue sua sponte (Marcroft was pro se), the case illustrates how easy it is for trial judges to confuse their responsibilities with those of a prosecutor. No doubt, the trial judge in *Marcroft* believed he was acting expeditiously yet, as the opinion demonstrates persuasively, he stepped outside the role of adjudicator and became an advocate.

The trial court in *Marcroft* transgressed in a particularly visible manner, and thus the error was corrected on appeal, but there are many other occasions during the course of trial and related proceedings for a judge to assume the duties of an advocate when none is present to represent the state. Because most defendants in traffic cases are pro se, they will not have the ability to notice when the trial judge has overstepped those bounds—as

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conduct of an adversary proceeding, involving the defendant, the trial judge and, possibly, the opposing party—in other words, a replay of the entire trial—to determine what happened at trial. As petitioner has chosen not to raise the trial judge's actual conduct during the trial as a basis for this petition, the absence of a settled statement will be no impediment to this Court's consideration of the question presented.

Marcroft himself failed to do. It is only by ensuring that the prosecutorial function is, in fact, performed by a prosecutor that one can remove the temptation for trial judges to overstep their bounds.

Petitioner acknowledges that this Court has not always extended to defendants charged with petty crimes the full panoply of rights enjoyed by criminal defendants. Specifically, this Court in *Scott v. Illinois*, 440 U.S. 367 (1979), held that an indigent defendant is not entitled to appointed counsel, and in *Duncan v. Louisiana*, 391 U.S. 145, 158-59 (1968), that the right to trial by jury does not extend to petty offenses. But this Court has never approved procedures that fundamentally change the nature of the adversary process in criminal cases or those that create a material risk that the judicial officer presiding at criminal trials will be required to perform functions inconsistent with—even antithetical to--the judicial role. Given that tens or hundreds of thousands of individuals a year are subjected to such constitutionally suspect procedures in California alone, this is surely a matter that merits this Court's attention.

III. Petitioner's Case Presents an Appropriate Vehicle for the Court's Consideration of the Question Presented.

A case about the petty crime of jaywalking decided in an unpublished decision of the Appellate Division of the Los Angeles Superior Court surely does not commend itself as the most likely candidate for plenary consideration by this Court. *But see Thompson v. City of*

Louisville, 362 U.S. 199 (1960) (certiorari to the Police Court of Louisville, Kentucky to review for sufficiency of the evidence criminal convictions for loitering and disorderly conduct, carrying a total fine of $20). However, if the Court believes that the Question Presented raises significant constitutional issues concerning the fair and proper administration of the criminal laws, petitioner's case provides an ideal vehicle for resolving those issues.

First, as to the absence of a published opinion below, the law is now so well established in California that the issue is unlikely to ever again be addressed in a published opinion. Because all traffic infraction cases are appealed to the Appellate Division of the Superior Court, and because California law provides for no further review, either to the state court of appeal or the state supreme court, *see* app. 7, it is almost inconceivable that a case raising this issue will ever be presented to those higher California courts. Nor, absent another judicial rebellion, as in *Kottmeier*, *see* p. 17-18 *supra*, will the California Supreme Court have occasion to revisit *Carlucci*. Petitioner's case thus presents as good an opportunity as this Court will have to address the issue.

Second, if the Court denies the petition, it is unlikely the issue will be raised again anytime soon. Although tens, even hundreds of thousands of defendants are tried and convicted in cases where a prosecutor is absent, few have the resources, legal acumen or incentive to petition this Court for review of their convictions. Even fewer would realize the constitutional implications of the absence of a prosecutor, and many may have the mistaken impression they are better off in the absence of a

professional prosecutor. In fact, as *Figueroa Ruiz* observed, the prejudice suffered by a defendant from the absence of a prosecutor may be so subtle that it will not be apparent from the face of the record; criminal defendants in traffic infraction cases may suffer prejudice and never be aware of it.

Third, granting the petition will give this Court an opportunity to consider the troubling constitutional implications stemming from the fact that fines from traffic infractions are becoming an important source of revenue for the states and local communities. *See, e.g.*, David Armstrong, *Speed Traps Seen as Fast Lane to Profit*, Boston Globe, May 7, 1995, at 1; *Big Brother's Camera*, Wall St. J., July 3, 2001, at A14; Arthur Santana, *Camera Ready or Not*, Wash. Post, Apr. 2, 2000, at C1. Traffic fines have become a business run by local law authorities, the proceeds benefiting government institutions, including police departments and the courts.[9] When operated with the imprimatur—and coercive force—of the criminal laws, this enterprise touches the lives of ordinary citizens far more than any of the other activities of law enforcement and the courts. Like any business, the state seeks to

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[9] In California, traffic infraction fines are deposited into either the general fund of the county (if the fine is imposed by the county), Cal. Penal Code § 1463.001(b)(2) (West 2000), or divided between the general fund of the county and a special "Traffic Safety Fund" of the city (if the ticket is issued by the city), *id.* § 1463.001(b)(3). While the city's fund can be used only for traffic safety-related purposes, increasing the size of the fund frees up tax revenue the city can spend for other purposes; there is no restriction at all on the county's use of the funds.

maximize revenues by cutting costs. Often this means short-circuiting procedure in the interest of "efficiency" or "informality."

There is significant evidence that this quest for maximizing revenues, while cutting costs, may be causing serious unfairness to those accused of traffic infractions. A lawsuit awaiting settlement in the United States District Court for the Northern District of California, *Weidman v. City of San Francisco*, No. C99-04442 TEH (N.D. Cal. filed May 24, 1999), charges that police in San Francisco have systematically issued tickets for jaywalking for conduct that did not, in fact, violate the state's jaywalking statute. *See* Jaxon Van Derbeken, *Jaywalk Ticket Sets Off Legal Odyssey*, San Francisco Chron., July 20, 2001, at A21. The legal issue having finally come to the attention of the City Attorney because of the lawsuit challenging this practice, the city has agreed to settle on terms that acknowledge the police systematically misapplied state law.[10]

While the settlement will prevent future violations, at least in San Francisco, it is quite likely that the City Attorney's lack of involvement with traffic infractions contributed to the unlawful practice in the first place. After all, police must often interpret the law when they issue citations; prosecutorial involvement can educate police as to the proper application of the law, and correct abuses before they become widespread. In their quest to

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[10] The joint application for approval of class settlement and the declaration of the Deputy City Attorney in support of the application, all of which the Court may judicially notice, are reproduced at App. 10-32.

maximize traffic revenues, cities and counties in California have removed this important procedural safeguard, and invited the kind of systemic abuses the *Weidman* plaintiffs demonstrated with respect to even a simple provision like the jaywalking statute. How much more likely it is that such systemic abuses will occur with respect to more complicated traffic-control statutes, where the revenues from each infraction can run into the hundreds of dollars?

A case now being litigated in the Superior Court of San Diego suggests that it is very likely indeed. The plaintiffs in that case challenged the city's reliance on cameras to police red lights at intersections. To operate the cameras, the city has hired a commercial party, which maintains the cameras, reviews the photographs and makes an initial determination whether a violation has occurred. If it so finds, it prints the citation, affixes a stamped signature of the police official in charge of the program and mails it to the registered owner of the vehicle. For each fine collected, the company receives a contingency fee. In an interim ruling, the state trial judge found that the city has displayed a "total lack of oversight" over the operation of the system, and that "the method of compensation raises serious questions" as to whether the evidence produced by the cameras was "so untrustworthy and unreliable" as to potentially require exclusion. *People v. Allen* (*In re Red Light Camera Cases*), No. 57927SD (Super. Ct. Aug. 15, 2001) (ruling on

defendants' motion to dismiss and order to show cause).[11] Pointedly, in upholding the city's decision to delegate the operation of the cameras to a commercial party against a related constitutional challenge, the trial judge emphasized that prosecutorial oversight was available, noting that "the ultimate decision of whether or not to prosecute remained with the prosecutor." *Id.*

One must ponder whether systematic violations of state law at the hands of law enforcement authorities are not, at least in part, traceable to the fact that police in California are issuing millions of traffic tickets with absolutely no prosecutorial supervision.[12] While errors by police are unavoidable, they can be much more readily corrected if prosecutors can guide law enforcement authorities to change their behavior upon observing repeated misapplications of the law. By entirely removing prosecutors from the law enforcement process for traffic infractions, California has entered a brave new world where police enforce a complex and pervasive area of criminal law with no guidance from anyone with legal training. As *Weidman* and *In re Red Light Camera Cases* demonstrate, they can do so for a long time under a complete misapprehension as to what the law is.

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[11] Although the ruling is unreported, it is available online at http://www.alexandrialawlibrary.com/red57927.dismiss-ord-080901.htm.

[12] According to statistics released by the California courts, there were between 5 and 6 million citations issued state-wide every year for the period 1989-1999. 2000 Court Statistics 39, 50 tbl.7.

California may be concerned that providing a prosecutor for every traffic infraction trial would be too expensive. If so, California can follow the approach adopted by other states and decriminalize some or all of its traffic infractions. When these violations are removed from the criminal sphere, the state may be entitled to provide simplified adjudicatory proceedings without raising due process concerns. *See Van Harken*, 103 F.3d at 1349; *Hellenthal*, 2001 WL 867917. However, when a state chooses to retain an offense as criminal, and to apply to it a range of criminal punishments, it assumes a duty to provide defendants with constitutionally required procedures.

This petition presents the constitutional issue in the most clear-cut form. Petitioner does not seek review of any particular unfairness on the part of the trial judge. Petitioner contends, rather, that putting the judge in the position of having to look out for the prosecution's interests creates a risk of bias, or at least a constitutionally impermissible appearance of bias.[13] As this Court stated, in *Offutt v. United States*, 348 U.S. 11, 14 (1959), "justice must satisfy the appearance of justice." By granting the petition, this Court will be able to decide whether the absence of a prosecutor (and the concomitant assignment of prosecutorial functions to the judge) creates an

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[13] By adversely affecting the impartiality of the adjudicator, the error is structural and therefore not subject to harmless error analysis. *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991); *Gomez v. United States*, 490 U.S. 858, 876 (1989); *Gray v. Mississippi*, 481 U.S. 648, 668 (1987).

impermissible abridgment of the rights of hundreds of thousands of citizens every year.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marcy J.K. Tiffany
Counsel of Record
33 Marguerite Drive
Rancho Palos Verdes, CA 90275
310-541-9294

August 28, 2001

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent

v.

YALE TIFFANY KOZINSKI,

Defendant and Appellant.

No. BR 40958

South Bay Trial Court

No. L763671

MEMORANDUM JUDGMENT

This cause having been submitted for decision, and fully considered, judgment is ordered as follows:

The judgment is affirmed.

Defendant Yale Kozinski (hereinafter "appellant") appeals from his conviction of violating Vehicle Code section 21955 (jaywalking).

On June 12, 2000, appellant was issued a citation for violating Vehicle Code section 21955. Trial was held on October 31, 2000. Following trial, appellant was found guilty of the charged offense. This appeal follows. On appeal, appellant asserts the following contentions:

1. The judgment should be reversed because there was no one present in court to represent the State of California.

2. Appellant's right to due process was denied because the trial judge performed the duties of the prosecuting attorney.

3. The trial court committed error in denying appellant's motion to dismiss.

4. There was insufficient evidence presented at trial to support the judgment.

Appellant's first contention is contrary to settled California law. The California Supreme Court has held that a traffic trial may be conducted by a judge without the presence of a prosecuting attorney. "From the foregoing we conclude that the trial court may call and question witnesses in the absence of a prosecutor. Such actions constitute neither a per se denial of due process nor transmute the judge into prosecutor." (*People v. Carlucci* (1979) 23 Cal.3d 249, 256.)

None of the remaining contentions asserted by appellant can be considered by this court as this appeal is

taken on a clerk's transcript[1]; appellant has not included either a reporter's transcript or a settled statement of the oral proceedings at trial. (Cal. Rules of Court, rule 183.) Appellant's statements in his brief as to what occurred at trial cannot be considered by us as these facts are outside the record on appeal. (*People v. Young* (1978) 85 Cal.App.3d 594, 608.) On an appeal based on a clerk's transcript, we must presume that the judgment is valid and that the evidence is sufficient to sustain the judgment. Our review is limited to whether the pleadings are sufficient and whether the statement of decision, if any, supports the judgment. Any reversible error must appear on the face of the record. (*Wheelright v. County of Marin* (1970) 2 Cal.3d 448, 454; *Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082-1083; *Lincoln v. Averill* (1941) 47 Cal.App.2d 335, 338-339.) The record which appellant has presented to this court is inadequate for us to consider the merits of his contentions on appeal. On the limited record before us, we must presume the validity of the judgment.

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[1] Appellant filed his opening brief on February 20, 2001. No respondent's brief was filed. Had respondent's brief been timely filed, appellant's reply brief would have been due on or before March 23, 2001. On March 28, 2001, appellant attempted to file what he deemed to be a reply brief, containing citations to a reporter's transcript which is not part of the record on appeal. On March 29, 2001, appellant filed a motion giving notice of intent to file a reporter's transcript. By written order dated March 30, appellant's request to file the transcript was denied by this court on the ground the transcript was not properly certified by the trial court nor correctly submitted as part of the official record. There is no reporter's transcript in the record on appeal, and the appeal is being decided based upon a clerk's transcript.

The judgment is affirmed.

Kriegler, J.

We concur.

Beverly, P.J.

Lee, J.

(Filed May 2, 2001)

APPELLATE DIVISION OF THE SUPERIOR COURT

STATE OF CALIFORNIA,

COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

YALE TIFFANY KOZINSKI,

Defendant and Appellant.

No. BR 40958

South Bay Trial Court

No. L763671

ORDER DENYING REHEARING

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered,

Said petition is hereby denied.

Kriegler, J.

Beverly, P.J.

App. 6

Lee, J.

(Filed May 31, 2001)

Appellate Division

of

The Superior Court
111 North Hill Street
Room 607
Los Angeles, CA 90012

June 27, 2001

Yale Kozinski
33 Marguerite Dr.
Rancho Palos Verdes, CA 90275

Re: People v. Kozinski, BR 40958 (Trial Court No. L763671)

Dear Mr. Kozinski,

This court has received a purported Notice of Appeal by which you indicate your intention to appeal a decision of the Appellate Division of the Superior Court, in the above referenced matter, to a higher court. The Presiding Judge has instructed me to return your document as there is no provision of law for an appeal, as such, from a decision of an Appellate Division of the Superior Court.

Yours truly,

S/Alan Hardey

Alan Hardey
Appellate Administrator

Encl.

MUNICIPAL COURT OF CALIFORNIA

COUNTY OF LOS ANGELES, SOUTH BAY JUDICIAL DISTRICT

ADDITIONAL COURT PROCEEDINGS

Defendant(s): Kozinski, Yale

Case Number: L763671

Date and Judicial Officer:	**Div.:**	**Type of Proceeding:**	**Proceedings and Rulings:**
Oct. 13, 2000 Laura C. Ellison S. Hepponstall Lisa Sprague CSR 10484 Pro per status	P		Defendant's request to transfer case out of Los Angeles County is denied. Court on traffic trial granted to 10-31-00 at 8:30. "P" Defendant ordered each subpoena request issued. Vacate 10-17-00.

Oct. 31, 2000 Laura C. Ellison S. Hepponstall Sprague 10484 Pro per status Officer Del Pinto	P	CT	Defendant found guilty. $77 fine due 12-14-00 in traffic center.

LOUISE H. REENE, State Bar #36508
City Attorney
LORETTA M. GIORGI, SBN 122879
Chief Attorney - Public Protection Unit
MARGARET W. BAUMGARTNER, SBN 151762
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-4658
Facsimile: (415) 554-4699
E-Mail: Margaret_Baumgartner@ci.sf.ca.us

Attorneys for Defendants

UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT WEIDMAN, Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE DEPARTMENT, OFFICER CONSTANTINE ZACHOS, OFFICER CARLOS GUTIERREZ, AND DOES 1-100, Defendants.

Case No. C99-04442 TEH

JOINT APPLICATION FOR APPROVAL OF CLASS SETTLEMENT

Date: July 23, 2001
Time: 1:30 p.m.
Ctrm: 12, 19th Fl.

Both parties having agreed to a settlement, and both parties agree that the settlement is fair, reasonable and adequate, both parties now request that this court approve the attached settlement agreement.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 1998 and 1999, the San Francisco Police Department issued citations to at least 45 persons for jaywalking. The majority, but not all, of the citations were on Capp St. in San Francisco. The Vehicle Code Section under which these persons were cited, California Vehicle Code § 21955, requires a "traffic control signal device" at adjacent intersections. Section 445 of the California Vehicle Code defines "traffic control signal device" as a stop light, not a stop sign. The intersections adjacent to the relevant blocks of Capp St., and other locations were [sic] officers gave jaywalking tickets, do not have signals, only stop signs.

In May 1999, plaintiff filed a class action complaint in state court alleging that the San Francisco Police Department's cites were unlawful. Plaintiff requested monetary damages and injunctive relief. The City removed the case to federal court. After a contested

hearing, this court certified a class action for injunctive relief only, for "all persons who have been cited since May 25, 1998, and all persons who will be cited, for violating California Vehicle Code § 21955 within the City and County of San Francisco, where one or both ends of the street they allegedly crossed lacked as [sic] 'traffic control signal device' as defined by California Vehicle Code § 445."

After the court certified the class, the parties entered into settlement discussions. After a lengthy series of negotiations, which included the exchange of numerous letters regarding the terms of the settlement, the parties agreed to settle the case pursuant to the terms of the settlement agreement attached to the declaration of Margaret W. Baumgartner filed herewith.

The key terms of the settlement agreement are that the San Francisco Police Department: (1) will issue a notice to its officers clarifying the application of California Vehicle Code Section 21955; (2) agrees to not allow a policy or custom whereby its officer misapply California Vehicle Code Section 21955; (3) will train its officers in the proper application of Section 21955 of the California Vehicle Code; and (4) shall pay the named class plaintiff a settlement of $27,000, which includes attorneys' fees. The parties have also agreed that the City will pay plaintiffs' counsel for all services over 10 hours rendered by counsel for plaintiffs after December 13, 2000, but prior to the date of dismissal. If the parties are unable to reach a final agreement with regard to fees for that period, plaintiffs' counsel will present his request for additional fees to the court for resolution.

In exchange for this dismissal, the named class plaintiff releases all claims against the City. The class members release all claims for "injunctive or declaratory relief relating to defendants' alleged custom and practice of citing people for violations of California Vehicle Code Section 21955 where one or both ends of the street they allegedly cross lacks a 'traffic control signal device' as defined by California Vehicle Code Section 445, or arising out of the 45 citations attached to the Declaration of Matthew Witteman in Support of Motion for Class Certification filed in this court."

The City has provided notice of the settlement and the fairness hearing to class members through two different means. First, the City has published a notice in the Chronicle newspaper on three different dates, June 23, 2001 and July 2 and 7, 2001. A copy of that notice is attached to the settlement agreement as Exhibit A.

Additionally, the City has sent the notice attached to the settlement agreement as Exhibit B to the 45 persons cited by the Department during the period 1998 to 1999.

This matter has been forwarded to the Board of Supervisors for approval. The City Attorney's office is recommending the settlement. Any approval of the settlement must be contingent on the final approval by the Board of Supervisors.

STANDARD

Courts judge the fairness of a proposed compromise of a class action by weighing the plaintiff's likelihood of

success on the merits against the amount and form of the relief offered in the settlement. *Protective Committee for Independent Stockholders v. Anderson*, 390 U.S. 414, 424-25 (1968). "Basic to this process in every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Id.*; see also *San Francisco NAACP v. San Francisco Unified School District*, 59 F.Supp. 2d 1021, 1026 (1999).

Here, the settlement provides the class with the majority, if not all, of the relief that the class could otherwise obtain after trial. The San Francisco Police Department has agreed to train its officers regarding the proper application of the Vehicle Code Section at issue. The Department is issuing a bulletin explaining the proper application of the code section. The Department is also agreeing that it will not create or tolerate a policy that permits its officers to regularly misinterpret the Vehicle Code Section.

Furthermore, the settlement releases only injunctive relief and claims related to the 45 identified citations. Thus, a class member who received a citation other than those identified could still make a claim for damages for the citation. Any class member could also seek to enforce the terms of the settlement agreement.

Because it is uncertain that the class members could obtain greater relief after trial, and because the relief addresses the issue raised by the complaint, the parties believe that this is a fair settlement and should be approved by the court.

CONCLUSION

For the foregoing reasons, the court should approve this application to approve the class settlement.

Dated: July 3, 2001

LOUISE H. RENNE
City Attorney
LORETTA M. GIORGI
Chief Attorney -
Public Protection Unit
MARGARET W.
BAUMGARTNER
Deputy City Attorney

By: S/Margaret W. Baumgartner

MARGARET W. BAUMGARTNER
Attorneys for Defendants

Dated: July 3, 2001

LAW OFFICES OF MATTHEW J. WITTEMAN

By: S/Matthew J. Witteman

MATTHEW J. WITTEMAN
Attorney for Plaintiff

(Filed July 1, 2001)
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

LOUISE H. RENNE, State Bar #36508
City Attorney
LORETTA M. GIORGI, SBN 122879
Chief Attorney - Public Protection Unit
MARGARET W. BAUMGARTNER, SBN 151762
Deputy City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, California 94102
Telephone: (415) 554-4658
Facsimile: (415) 554-4699
E-Mail: Margaret_Baumgartner@ci.sf.ca.us

Attorneys for Defendants

UNITED STATES DISTRICT COURT

IN AND FOR THE NORTHERN DISTRICT OF CALIFORNIA

ROBERT WEIDMAN, Plaintiff,

vs.

THE CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO POLICE DEPARTMENT, OFFICER CONSTANTINE ZACHOS, OFFICER CARLOS GUTIERREZ, AND DOES 1-100, Defendants.

Case No. C99-04442 TEH

DECLARATION OF MARGARET W. BAUMGARTNER IN SUPPORT OF JOINT APPLICATION FOR APPROVAL OF CLASS SETTLEMENT

Date: July 23, 2001
Time: 1:30 p.m.
Ctrm: 12, 19th Fl.

I, Margaret W. Baumgartner, declare:

1. I am a Deputy City Attorney with the San Francisco City Attorney's office. I am currently assigned to this matter. I have personal knowledge of the facts contained herein, except for those facts stated on information and belief, and as to those facts I believe them to be true. If called upon to testify, I could and would testify competently hereto.

2. This case was transferred to me after the former Deputy City Attorney assigned to the matter, Lisa Berkowitz, left the office. I had a number of conversations with Ms. Berkowitz, both before and after she left, regarding the history of negotiating the settlement in this matter.

3. The parties took some time and considerable negotiation to resolve this matter to the satisfaction of both parties. This settlement resulted from arms-length negotiations.

4. I believe that the settlement agreement attached hereto is a fair settlement of this matter.

5. Class counsel, although he has limited experience in class actions, is an able and experienced attorney, and negotiated a settlement in which the class obtained the majority, if not all, of the relief requested.

6. I have started the administrative process that results in the Board of Supervisors approving this settlement. I am not certain as to when the Board will hear the matter, because it must be reviewed by the Chief of Police and the Police Commission prior to the time that it is presented to the Board.

7. Attached hereto is a copy of the settlement agreement agreed to by the parties. I have not yet received a signed copy from plaintiff, but I have obtained representations from class counsel that he has agreed to the settlement, and believes it to be fair.

8. I caused the publication of the notice attached as Exhibit A to the settlement agreement to be published in the San Francisco Chronicle on June 23, July 2 and July 7, 2001

9. On or about June 29, 2001, I caused the service by first class mail of the notice attached as Exhibit B to the settlement agreement on the persons whose addresses were on the citations that were identified in the claim.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 3, 2001

By: S\ Margaret W. Baumgartner

MARGARET W. BAUMGARTNER

SETTLEMENT AGREEMENT

The purpose of this agreement is to settle and resolve claims asserted or which could have been asserted in the case entitled *Robert Weidman v. City and County of San Francisco, Officer Constantine Zashos and Officer Carlos Guitierrez*, C99-04442 THE [sic] pending in the United States District Court for the Northern District of California, before the Honorable Thelton E. Henderson (the "Action") as specifically set forth below.

The Parties

The following persons are the parties to the Action and, through their respective counsel, parties to this Settlement Agreement ("Agreement"):

a. Plaintiff and Class Representative Robert Weidman ("Individual Plaintiff")

b. The plaintiff class of "all persons who have been cited since May 25, 1998, and all persons who will be cited, for violating California Vehicle Code § 21955 within the City of County of San Francisco, where one or both ends of the street they allegedly crossed lacked as [sic] "traffic control signal device" as defined by California Vehicle Code § 445" as set forth in the Order Approving in Part and Denying in Part Plaintiff's Motion for Class Certification, entered on October 13, 2000 ("Class").

c. Defendants City and County of San Francisco, San Francisco Police Department, Officers Constantine Zachos, Officer Carlos Gutierrez and DOES 1-100 (collectively "the City").

d. The Individual Plaintiff, the Class and the City are collectively referred to in this Agreement as the Parties.

Procedural History

On May 24, 1999, 2000 [sic], plaintiff filed his action challenging the alleged policy of the San Francisco Police Department of issuing citations under California Vehicle Code § 21955 to persons who enter a street between two corners that are not controlled by traffic signal devices as defined in California Vehicle Code § 445 ("traffic lights") nor controlled by police officers. On September 11, 2000, the court heard a motion to certify the class. On October 13, 2000, the court certified the class pursuant to Federal Rule of Civil Procedure 23(b)2) for purposes of injunctive or declaratory relief, but no ancillary damages.

AGREEMENT

Since the time of the certification of the class, the parties have been working to achieve a settlement. Accordingly, the parties hereto agree as follows:

1. Payment of Damages and Attorñeys' Fees. The City will pay to Individual Plaintiff $27,500 (twenty seven thousand five hundred dollars) in full and final release of any and all claims for damages and attorney's fees and costs up to and including December 13, 2000. If this action is dismissed in accordance with the provisions of Paragraph 7, below, the parties agree that for all services over 10 hours rendered by counsel for plaintiffs after December 13, 2000, but prior to the date of dismissal, shall be presented to the City for consideration. If the parties are unable to reach a final agreement with regard to fees for the period December 13, 2000 until the time of

dismissal, plaintiff's counsel will present his request for additional fees to the court for resolution.

2. **Issuance of Department Bulletin.** The San Francisco Police Department will agree to issue a bulletin to its members setting forth the requirements for citation under California Vehicle Code §§ 21955 and 455, in language to be agreed upon by the parties. A copy of the bulletin is attached hereto as Exhibit A and incorporated herein.

3. **Creation of Policy or Custom.** The San Francisco Police Department agrees that it will not create or tolerate a policy or custom on the part of the San Francisco Police Department to cite for California Vehicle Code § 21955 unless there is a traffic signal at each end of the block or the intersections are controlled by police officers.

4. **Training.** The San Francisco Police Department shall include in *basic* training of its officers the proper application of Sections 21955 and 455 of the California Vehicle Code.

5. **Application to the Court.** The parties agree to file a joint application with the court and to take all other steps necessary to seek the court's approval of this Agreement and the settlement pursuant to Rule 23(e).

6. **Class Notice of Settlement.** Notice of the proposed settlement pursuant to this Agreement shall be provided to the Class in a form attached as Exhibit A by publishing the notice in the San Francisco Chronicle on June 23, 2001, and July 2 and 8, 2001, and by sending the notice attached as Exhibit B by first class mail to the addresses listed on

the citations that were submitted with plaintiff's motion for class certification.

7. **Dismissal of the Action.** The court shall dismiss this action after conducting a fairness hearing as required by Rule 23(e) of the Federal Rules of Civil Procedure. This settlement agreement will be attached as an exhibit to the dismissal order and incorporated therein by reference.

8. **Release of All Claims by Individual Plaintiff.** In consideration of and upon receipt of the payment set forth in paragraph 1, the Individual Plaintiff and his assigns release and discharge forever the City, together with the City's past or present employees, officers, elected officials, and agents, and all persons who have acted under the City's direction or control, from any and all known or unknown, past, present or future claims, demands, obligations, causes of action, rights, damages, costs, losses, expenses or compensation of any kind that have been or could have been asserted in this Action, including but not limited to, any and all claims arising from or in any way related to the Complaint in this Action, except to enforce this agreement. The release provided in this paragraph and in paragraphs 7-9 below, shall become effective, if, but only if, and only upon, the receipt by the individual Plaintiff of the payment due to him under Paragraph 1 (hereinafter referred to as "condition of release"). If the condition of release is not met, the release provided in this paragraph and paragraphs 7-9 below shall be null and void and of no further force or effect as to the Individual Plaintiff, who shall thereafter remain a plaintiff and class representative in this Action, with all of the rights of a plaintiff and class representative, including

the right to pursue any and all individual claims that person may have against the City arising out of the events that are the subject of this Action; provided, however, that any payment previously received by such person under Paragraph 1 shall be offset against any damages that the Individual Plaintiff recovers.

9. Further Releases by Individual Plaintiff. Subject to the Conditions of Release set forth above, the Individual Plaintiff expressly acknowledges and understands that the nature, extent and results of the claims released may not now all be know [sic] or anticipated, and that they may later discover facts different from or in addition to those that they now believe to be true. Nevertheless, the Individual Plaintiff desires to settle and compromise in full and to release all possible claims, demands, obligations, causes of action, rights, damages, costs, losses, expenses or compensation of any kind that have been or could have been asserted in this Action. Therefore, subject to the conditions of release set forth above, the Individual Plaintiff expressly waives and relinquishes any and all rights under California Civil Code Section 1542, which provides:

> **A General Release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected the settlement with the debtor.**

10. Covenant by Class Not to Sue. Except for an action to enforce this agreement, the Class covenants and agrees never to commence or assert against the defendants, or any of them, any claim for injunctive or

declaratory relating to defendants' alleged custom and practice of citing people for violations of California Vehicle Code Section 21955 where one or both ends of the street they allegedly cross lacks a "traffic control signal device" as defined by California Vehicle Code Section 445, or arising out of the 45 citations attached to the Declaration of Matthew Witteman in Support of Motion for Class Certification filed in this court.

11. Covenant by Individual Plaintiff Not to Sue. If the Individual Plaintiff receives the payment set forth in Paragraph 1, he covenants and agrees never to commence or assert against the City any claims,. demands, obligations, causes of action, rights, damages, costs, losses, expenses or compensation of any kind that have been or could have been asserted in this Action, except as otherwise stated herein.

12. No Admission of Liability. By entering into this Agreement, the City does not concede that it violated either Individual Plaintiff's or Plaintiff Class' constitutional or other rights, or that any plaintiff was harmed by the City. The City is entering into this agreement to avoid extensive and expensive litigation, and for no other reason. Nothing in this Agreement may be considered an admission by the City of any wrongdoing.

13. Entire Agreement. This Agreement contains the entire agreement of the parties and supersedes any prior oral or written agreements, proposals, understandings or discussions.

14. Successors and Assigns. The terms and conditions of this Agreement shall inure to the benefit of and be binding upon the successors, heirs and assignees of the Parties.

15. Drafting of the Agreement. The parties agree that this Agreement was jointly drafted by the parties and that any ambiguities in it shall not be construed against any of the parties.

16. Approvals. It is understood by the parties that this Agreement shall become effective only upon its approval by majority vote of the San Francisco Board of Supervisors and its acceptance and approval by the Court. For purposes of Paragraphs [sic] above, approval; shall be deemed to have occurred on the date that the Mayor signs the ordinance that the City's Board of Supervisors has adopted approving the Agreement. Failing such approval, it is understood by all parties that this Agreement shall be of no further force or effect and that the Action and the litigation shall continue.

17. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

18. Introductory Sections and Paragraph Headings. The paragraph headings found in this Agreement, and the Introductory Section including the history and background statements, are not intended to state any substantive obligations of the Agreement and shall not be used to construe or interpret the Agreement.

19. Amendment of Agreement. The Agreement may be amended only by a written instrument signed by

counsel for all parties and with the approval of the San Francisco Board of Supervisors, if such approval is required by law. All amendments of the Agreement that modify the rights or obligations of the Class must also be approved by the Court.

20. Counterparts. This Agreement may be executed in counterparts.

Dated: _____ _____

Robert Weidman
Individual Plaintiff

Dated: _____ _____

LAW OFFICES OF
MATTHEW WITTEMAN

By: _____

Matthew Witteman
Attorney for Plaintiffs

Dated: _____

LOUISE H. RENNE
City Attorney
JOANNE HOEPER
Chief Trial Deputy

By:_____

Margaret W. Baumgartner
Deputy City Attorney

(Filed July 1, 2001)
Richard W. Wieking
Clerk, U.S. District Court
Northern District of California

EXHIBIT A

NOTICE
TO PERSONS CITED FOR
JAYWALKING IN SF
MAY 25, 1998 TO THE PRESENT:

On July 23, 2001 at 1:30 p.m. the US Dist. Ct. will conduct a fairness hearing regarding a settlement for a certified class action for injunctive relief where plaintiffs are persons wrongly cited by the SFPD for jaywalking (CA Veh. Code § 21955.) The settlement requires the SFPD to train its officers to properly cite under § 21955 and to pay the named class plaintiff $27,000, which includes atty's fees. For more information or if YOU WISH TO CHALLENGE THE SETTLEMENT, notify plaintiffs' counsel before that date by sending a notice to:

M. Witteman
582 Market St. # 1906
San Francisco, CA 94104

EXHIBIT B

NOTICE TO PERSONS CITED FOR JAYWALKING IN SAN FRANCISCO

FROM MAY 25, 1998 TO THE PRESENT:

On October 13, 2000, the United States District Court of the Northern District of California certified a class action for injunctive relief only against the City and County of San Francisco that includes persons cited by the San Francisco Police Department for jaywalking in violation of California Vehicle Code Section 21955, where one or both ends of the street they allegedly crossed lacked as [sic] "traffic control signal device" as defined by California Vehicle Code § 445.

A settlement has been reached whereby the San Francisco Police Department: (1) shall issue a notice to its officers clarifying the application of California Vehicle Code Section 21955, (2) agrees to not allow a policy or custom whereby its officer misapply California Vehicle code Section 21955, (3) will train its officers in the proper application of Section 21955 of the California Vehicle Code and shall pay the named class plaintiff a settlement of $27,000, which includes attorneys' fees.

The court will conduct a fairness hearing regarding this settlement on [sic]. If you wish to challenge the settlement, you should notify plaintiffs' counsel before

that date by sending a notice to:

Matthew J. Witteman
Law Office of Matthew Witteman
582 Market St., Suite 1906
San Francisco, CA 94104